

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ANTHONY AND COLETTE PANEBIANCO	:	DETERMINATION
	:	DTA NO. 816192
for Redetermination of a Deficiency or for Refund of	:	
Personal Income Tax under Article 22 of the Tax Law	:	
for the Years 1989 and 1990.	:	

Petitioners, Anthony and Colette Panebianco, 20 Greenleaf Drive, Huntington, New York 11743, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1989 and 1990.

On August 21, 1998 and August 27, 1998, respectively, petitioners, by their representative, Jerri Ann Cirino, Esq., and the Division of Taxation by Terrence M. Boyle, Esq. (Kevin R. Law, Esq.) waived a hearing and agreed to submit this case for determination, with all documents and briefs to be submitted by February 12, 1999, which date began the six-month period for the issuance of this determination. After due consideration of the record, Frank W. Barrie, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation properly limited petitioners' net operating loss deductions for New York State personal income tax purposes to petitioners' positive amounts of Federal taxable income.

FINDINGS OF FACT

1. Over a period of years, petitioner Anthony Panebianco reported substantial losses from various interests in automobile related businesses, including various car dealerships, on his New York income tax returns filed jointly with his wife, petitioner Colette Panebianco. These car dealerships, which included Ozone Ford located in Ozone Park in the New York City borough of Queens, Auto Plaza Nissan located in Westbury (Nassau County), Westbury Dodge also located in Westbury (Nassau County), and Gold Coast Cadillac located in Greenvale (Nassau County), were all Federal subchapter S corporations. According to the statement of facts provided by the Division of Taxation (“Division”) in its brief, which was not challenged by petitioners,¹ these Federal subchapter S corporations “did not make such an election [of S status] for New York State purposes” (Division’s brief, p. 1).

2. Petitioners on or about October 15, 1993 filed untimely New York State personal income tax returns for each of the two years at issue as well as 1991 and 1992. Along with these income tax returns, petitioners filed refund claims based upon the carryback of net operating losses allegedly sustained in 1990, 1991 and 1992 to 1987, 1988 and 1989. Further, a report of Federal changes for 1988 was also filed along with the refund claims. For 1988, petitioners reported a Federal adjustment which increased their Federal taxable income by \$385, 561.00.

3. Petitioners did not use their Federal net operating loss deductions for New York State income tax purposes. Rather, they calculated separate and distinct New York State net operating loss deductions, in excess of Federal net operating loss deductions, based upon their use of amounts representing New York State adjusted gross income . These amounts were greater than

¹Petitioners were given the opportunity to submit documents along with an initial brief in support of their petition as well as the opportunity to submit a reply brief to the Division’s brief. They failed to submit any documents or briefs. Included in the record as an exhibit submitted by the division are photocopies of various New York income tax returns whose significance is difficult to decipher given the lack of any cogent explanation of their contents by petitioners.

the respective amounts for Federal adjusted gross income because they included the addition of New York modifications to Federal adjusted gross income under Tax Law § 612(a) for losses flowing from Federal S corporations that had not made S corporation elections for New York State tax purposes.

4. The Division separately issued the same Statement of Proposed Audit Changes dated November 6, 1995 to each petitioner, respectively. The Statement of Proposed Audit Changes asserted total income tax due of \$47,675.00, plus penalty and interest, calculated as follows:

Tax Period Ended	Tax Amount Assessed	Interest Amount Assessed	Penalty Amount Assessed	Assessment Payments/ Credits	Current Balance Due
12-31-88	\$ 5,082.00	\$ 7,943.41	\$ 0.00	\$13,025.41	\$ 0.00
12-31-89	41,545.00	20,474.91	20,095.08	11,231.29	70,883.70
12-31-90	1,048.00	412.68	522.80	0.00	1,983.48
Totals	\$47,675.00	\$28,831.00	\$20,617.88	\$24,256.70	\$72,867.18

An attachment sheet to the Statement of Proposed Audit Changes provided the following explanation with reference to 1989 and 1990, the two years at issue in this matter,² in relevant part as follows:

The tax due was not paid when the return was filed.

* * *

The net operating loss deduction for New York State purposes is computed on the same amounts as for federal tax purposes. Your net operating loss is recomputed as shown.³

²The additional tax shown due for 1988 represented the amount petitioners owed but “was not paid when [their] federal audit changes were reported.”

³The Statement of Proposed Audit Changes included detailed computations of petitioners’ net operating losses for 1990, 1991, and 1992.

The net operating loss deduction is the lesser of the net operating loss available or the Federal taxable income in the carryback year.

Net nonbusiness capital losses must be added to negative federal taxable income in the computation of your allowable net operating loss.

Dividends are considered nonbusiness income and must be subtracted in the computation of your allowable net operating loss.

5. The Division separately issued the same Notice of Deficiency dated January 2, 1996 to each petitioner, respectively. The Notice of Deficiency asserted income tax due of \$47,675.00 plus penalty and interest. The income tax asserted due of \$47,675.00 consisted of tax due for 1988 of \$5,082.00, for 1989 of \$41,545.00, and for 1990 of \$1,048.00, which mirrored the amounts shown due on the Statement of Proposed Audit Changes dated November 6, 1995. The Statement of Proposed Audit Changes was specifically referenced in the Notice of Deficiency.

6. By a conciliation order dated August 8, 1997, the amount of tax asserted due for the two years at issue, 1989 and 1990, was not reduced. However, the total tax asserted due by the conciliation order, which included an increased loss for 1988, was reduced to \$10,110.60 plus penalty and interest. The \$10,110.60 consisted of the following: for 1988, (\$32,482.40); for 1989, \$41,545.00; and for 1990, \$1,048.00.

7. Petitioners filed a petition dated November 5, 1997 which contested the tax asserted due for 1989 and 1990. The petition is difficult to decipher. First, petitioners state that the amount of tax determined was \$41,545.00 for 1989 and \$1,048.00 for 1990 which correctly corresponds to the amounts reflected in the conciliation order dated August 8, 1997. However, the petition then states that the amount of tax contested is (\$9,343.00) for 1989 and (\$0.00) for 1990. It seems likely that petitioners are seeking a refund of \$9,343.00 for 1989 and a finding of no tax due for 1990 but the petition is not properly drafted. Further, petitioners allege, in a

fashion that is not easily deciphered, that the Commissioner of Taxation and Finance made the following three errors:

(1) Taxpayers net operating losses for 1988 and 1989 were business losses full[y] deductible for those years.

(2) Desk audit added back such losses as flow through losses (for N.Y. State "C" Corps- Federal "S" Corps).

(3) The subject losses were not flow through losses and therefore should have been recognized in their entirety.

8. The Statement of Issue at the start of this determination was provided by the Division in its brief which has not been contradicted or challenged by petitioners. Moreover, petitioners have not provided any further explanation or clarification of the allegations of error in their petition.

CONCLUSIONS OF LAW

A. Pursuant to Tax Law § 612(b)(19), in computing the New York adjusted gross income of a resident individual, who was also a shareholder of a corporation that had elected small business corporation status under the Federal Income Tax Law and had not done so under Tax Law § 660 for New York income tax purposes, it is necessary to add back to that individual's Federal adjusted gross income an amount equal to his or her proportionate share of the net operating loss of the corporation to the extent that it had been deducted in determining Federal adjusted gross income. Consequently, the Division properly disallowed the losses arising out of the operations of the various Federal S corporations in which petitioners had interests because these corporations had not elected similar S status for New York income tax purposes.

B. Petitioners may not avoid the ill effects of the failure, for whatever reason, to elect S corporation status for New York income tax purposes, by claiming greater net operating losses

for New York income tax purposes based upon the add back noted in Conclusion of Law “A” than what was claimed for Federal income tax purposes. The deduction for a net operating loss on a New York income tax return is limited to the amount of the Federal net operating loss deduction for the same year (*Gurney v. Tully*, 51 NY2d 818, 433 NYS2d 426; *Sheils v. State Tax Commission*, 52 NY2d 954, 437 NYS2d 968; *cf.*, *Royal Indemnity Co. v. Tax Appeals Tribunal*, 75 NY2d 75, 550 NYS2d 610). As a result, petitioners could not generate greater losses for New York tax purposes than their losses for Federal tax purposes for the years at issue.

C. The petition of Anthony and Colette Panebianco is denied, and the Notice of Deficiency dated January 2, 1996 is sustained except to the extent modified by the conciliation order dated August 8, 1997.

DATED: Troy, New York
May 27, 1999

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE